IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTER PATENT APPEAL NOS. 1649 OF 1997 TO 1659 OF 1997
AND
LETTERS PATENT APPEAL NO.1661 TO 1664 OF 1997
IN
SPECIAL CIVIL APPLICATION NOS.1954 OF 1994 TO 1967 OF 1994
AND
SPECIAL CIVIL APPLICATION NO. 9401 OF 1993

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA and
Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters
to see the judgement?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy
of the judgement?

4. Whether this case involves a substantial question
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

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TATA CHEMICALS LTD. & ORS.

Versus

THE UNION OF INDIA AND ORS.

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Appearance:
MR SB VAKIL for the appellants
MR RJ OZA for Respondents

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CORAM : HON'BLE MR.JUSTICES M.R.CALLA & MR.J.R.VORA, JJ.

Date of decision:11/05/99

COMMON CAV JUDGEMENT (per M.R.Calla, J.)

These Letters Patent Appeals, 15 in number, are directed against the common judgment and order dated 1.12.1997 passed by the learned Single Judge in the group

of Special Civil Applications Nos.1954 to 1967 of 1994 and 9401 of 1993 whereby all the Special Civil Applications were dismissed. Whereas these appeals are directed against the common judgment and order and all these matters involve common questions of law based on identical facts, we propose to decide these 15 Letters Patent Appeals by this common judgment and order.

2. The appellant no.1 in all these matters is a Limited Company incorporated and registered under the provisions of the Companies Act,1956 in the name and style of M/s.Tata Chemicals Ltd. engaged in the business of manufacturing heavy chemicals such as inorganic, photographic, insecticides, pesticides and other miscellaneous chemicals including Caustic Soda and Soda Ash. This Company claims to be the biggest Soda Ash manufacturer in the country and has come with the case that it has a large requirement of limestone because Lime stone is the basic raw material for manufacturing Soda Ash. It is also the case of the appellant Company that it holds on lease Limestone mines in the districts of Junagadh and Jamnagar; it also purchases Limestone from private leaseholders of Limestone mines who engage contract labour for working the mines and it also purchases Limestone from private parties. The Limestone is classified in different grades based on lime contents and other constituents. The appellant no.2 in these appeals claims to be the shareholder of the Company while the appellant no.3 in these cases (except in Letters Patent Appeal arising out of Special Civil Application No.9401 of 1993) is the party which provides the contract labour to the Company. Whereas the parties providing the contract labour are different at different places, such parties have been arrayed as appellant no.3 and, therefore, different Special Civil Applications and different Letters Patent Appeals have been filed. The appellant Company also claims that it holds the certificate of registration under Section 7 of the Contract Labour (Regulation and Abolition) Act, 1970 and that the appellant no.3, i.e. the party providing contract labour in all these matters holds a licence under Sections 12 and 13 of the aforesaid Act.

3. The appellant Company came with the case that right from beginning its factory for manufacturing Soda Ash has been employing contract labour through contractors in Limestone mines. It is also the case of the appellant Company that earlier, Limestone supply from the Company's captive mines was done by M/s.Palanji Shaupuraji & Co. but after the coming into force of the Metalliferous Mines Regulations under the Mines Act in

1964, the appellant Company started departmental mining through contractors and since then the skilled works like drilling and blasting are carried out by regular employees and unskilled work of Limestone breaking, loading, unloading and transport are carried out through contract labour. The Company and other Soda Ash manufacturers may purchase Limestone from the market and it is not necessary for them to operate Limestone mines, and it is also the case of the appellant Company that in fact Soda Ash manufacturers partly purchase their Limestone requirements from private leaseholders.

4. In the works of overburdened removal and drilling and blasting in the Limestone and dolomite mines, the Government of India had prohibited the employment of contract labour way back on 22nd June 1980. It has also been stated that the Government of India, Ministry of Labour, constituted a Committee under Section 5 of the Contract Labour (Regulation and Abolition) Act, 1970 (hereinafter referred to as 'the Act'), to go into the working of contract labour system in the Limestone and Dolomite mines, in the Country. The Committee so constituted under Section 5 of the Act to collect the information from cross-section of mines captive and noncaptive spread over different States, namely, Orissa, Madhya Pradesh, Rajasthan, Andhra Pradesh and Karnataka had visited the Limestone and Dolomite mines in these States. It is also the case of the appellant Company that this Committee did not visit any Limestone or Dolomite mine in Gujarat and also did not visit any mine operated by the appellant Company. On 17th March 1993, the Government of India issued a notification dated 17th March 1993 prohibiting employment of contract labour with effect from 3.4.1993 under Section 10(1) of the Act. Thus, the prohibition against the employment of contract labour became effective from 3rd April 1993 in the Limestone and Dolomite mines in the Country in the following works:

(i) Raising of minerals including breaking, sizing, sorting of Limestone/Dolomite, and

(ii) Transportation of Limestones/Dolomites which includes loading into and unloading from trucks, dumpers, conveyors and transporting from mine site to factory.

Against this notification dated 17th March 1993 issued by the Government of India under Section 10(1) of the Act prohibiting the employment of contract labour as aforesaid, the Company made a representation to the

Government of India on 21.6.1993. On 14th July 1993, the appellant Company informed the Government of India that it was submitting an application under Section 34 of the Act for exempting its establishment from the operation of the above notification. On 20th January 1994, the Licencing Officer, Government of India, passed an order revoking and cancelling the licence granted to the parties which were providing contract labour to the Company and also advised the Company that the certificate of registration held by it under Section 7 of the Act stood revoked with immediate effect. Aggrieved from the notification No.U-23013/15/86-L.W.(Vol.II) dated 17th March 1993 which was annexed as Annexure.A with the Special Civil Applications prohibiting the employment of contract labour in Limestone and Dolomite mines in the Country under Section 10(1) of the Act with effect from the date of its publication, i.e. 3rd April 1993 with regard to two works pointed out hereinabove in the earlier part of this order and the order dated 20th January 1994 filed with Special Civil Applications as Annexure.B under which the licence (valid upto 4th May 1994) granted to the parties providing contract labour was revoked and cancelled with immediate effect, the appellants filed the Special Civil Applications before this Court under Article 226 of the Constitution of India. These Special Civil Applications have been decided and dismissed by the learned Single Judge by the judgment and order dated 1.12.1997 and now the appellants (original petitioners) are before us through these Letters Patent Appeals wherein the notice returnable on 20th April 1998 was issued in March 1998 as per the order sheet recorded in Letters Patent Appeal No.1649 of 1997.

5. The impugned notification dated 17th March 1993 is reproduced as under:

"New Delhi, the 17th March, 1993.

S.O. 707.-- In exercise of the powers conferred by sub-section (1) of Section 10 of the Contract Labour (Regulation and Abolition) Act, 1970 (37 of 1970) the Central Government, after consultation with the Central Advisory Contract Labour Board, hereby prohibits with effect from the date of publication of this notification the employment of contract labour in the works specified in the following Schedule, in the Limestone and Dolomite Mines, in the country namely:-

SCHEDULE

(1) Raising of minerals including breaking,

sizing, sorting of limestone/dolomite, and

(2) Transportation of limestone and dolomite which includes loading into and unloading from trucks, dumpers, conveyors and transportation from mine site to factory.

No.U-23013/15/86.L.W.(Vol.II)
PADMA VENKATACHALAM, Director."

The impugned order dated 20th January 1994 is only a consequence of the impugned notification dated 17th March 1993.

6. The learned Counsel for the appellants has challenged the order passed by the learned Single Judge on more than one grounds including the ground that the learned Single Judge should not have decided the Special Civil Applications on merits even if the learned Counsel did not remain present and that he should have either adjourned the matter or should have dismissed the Special Civil Applications in default. We will be dealing with the latter ground in the later part of this order. First, we may deal with the grounds on which the decision of the learned Single Judge has been on merits impugned before us. It may be observed that in the context of the pleadings as were available before the learned Single Judge at the time he heard the matter (because the rejoinder appears to have been filed on 21.10.1997, i.e. after the matter was heard but before the pronouncement of judgment as has been stated in the memo of Letters Patent Appeals itself at page 'G' para 11), under para 6 of the impugned order, the learned Single Judge has briefly narrated the grounds on the basis of which the impugned notification Annexure.A and the impugned order Annexure.B were challenged in the Special Civil Applications and has dealt with these contentions in paras 29 to 50 of the judgment in the light of the scheme of the Act and has then dismissed the Special Civil Applications with the observations and directions in para 51 of the judgment which reads as under:

"51. Taking into consideration the totality of the facts of this case and the further fact that the impugned notification has subsequently been modified if still some grievance of the petitioners survives in respect of the revocation of licence and cancellation of certificate of registration, it is open to them to file an appeal against these orders before the appellate authority and in case such an appeal is filed

within a period of one month from today, the same shall not be dismissed on the ground of limitation and be decided on merits."

7. Having gone through the judgment and having heard learned Counsel for both the sides, we find that there is no justification for the grievance raised on behalf of the appellants that the learned Single Judge failed to consider the contentions which were raised in the petition, on the contrary, we find that the contentions as were raised have been duly adjudicated upon and it cannot be said that the impugned judgment suffers from the vice of non adjudication of the contentions raised in the petition.

8. Whereas the impugned notification issued under Section 10(1) of the Act and/or the revocation or the cancellation of the licence have been challenged, on the basis of the arguments which have been raised before us, we find that the main points which are required to be considered are as under:

(A) Whether the impugned notification under Section 10(1) of the Act has been issued by the Central Government without application of mind?

(B) Whether the principles of natural justice were required to be followed and the appellants were required to be heard before issuing the impugned notification?

(C) Whether the impugned notification is violative of Section 10 of the Act?

(D) Whether the impugned notification is violative of Article 14 of the Constitution of India?

9. Before we proceed to deal with these questions, we may usefully reproduce Section 10 of the Act which reads as under:

"10. Prohibition of employment of contract labour.- (1) Notwithstanding anything contained in this Act, the appropriate Government may, after consultation with the Central Board or, as the case may be, a State Board, prohibit, by notification in the Official Gazette, employment of contract labour in any process, operation or other work in any establishment.

(2) Before issuing any notification under

sub-section (1) to an establishment, the appropriate Government shall have regard to the conditions of work and benefits provided for the contract labour in that establishment and other relevant factors, such as--

(a) whether the process, operation or other work is incidental to, or necessary for the industry, trade, business, manufacture or occupation that is carried on in the establishment;

(b) whether it is of perennial nature, that is to say, it is of sufficient duration having regard to the nature of industry, trade, business, manufacture or occupation carried on in that establishment;

(c) whether it is done ordinarily through regular workmen in that establishment or an establishment similar thereto;

(d) whether it is sufficient to employ considerable number of whole-time workmen.

Explanation.-- If a question arises whether any process or operation or other work is of perennial nature, the decision of the appropriate Government thereon shall be final."

RE: POINT 'A'

10. The Act in question is an Act to regulate the employment of contract labour in certain establishments and to provide for its abolition in certain circumstances and for matters connected therewith. Under the Scheme of the Act, the Central Advisory Contract Labour Board, which will be hereinafter referred as 'the Central Board' is to be constituted by the Central Government under Section 3. This Central Board may constitute such Committees and for such purpose or purposes as it may think fit. The registration of establishment has been provided under Section 7 and the revocation of registration in certain cases in Section 8 thereof. The effect of nonregistration has been provided in Section 9. Section 10 begins with the nonobstente clause and provides for the prohibition of employment of contract labour and empowers the appropriate Government after consultation with the Central Board to prohibit the

contract labour in any process, operation or other work in any establishment by publishing the notification in the Official Gazette. In this context, the only requirement is the consultation with the Central Board. The application of mind by the Central Government is required to the extent that the issue of the notification under Section 10(1) prohibiting the contract labour must be after consultation with the Central Board. It is clear from the affidavit-in-reply dated 8th August 1997 filed on behalf of the respondents that a Committee was appointed under Section 5 by the Central Board to go into the question of working of contract labour system in Limestone and Dolomite mines in the country with the terms of reference as stipulated therein vide resolution dated 20th January 1986. The Committee decided to collect the relevant information from the cross-sections of mines, captive or non-captive all over the country and such information/data were furnished by 25 mine owners/managements including the present appellant Company, i.e. M/s.Tata Chemicals Ltd., Ranavav, District Junagadh, captive mine attached to Soda Ash plant by replying the questionnaire which was circulated by the Committee. Thus, the data was collected from the concerned mine owners all over the country and the Committee also visited five States viz. Orissa, Madhya Pradesh, Rajasthan, Andhra Pradesh and Karnataka which were selected to represent the regions and the Committee selected cross-sections of mines operated in public sector as well as private sector representing both big mines and small establishments. This Committee also held meeting with the representatives of the mine workers/Unions and the representatives of the management; it also visited the labour colonies to see their living conditions and this Committee observed that in majority of mines the statutory welfare amenities like provisions of drinking water, first aid, urinals and latrines, washing facilities, canteens, etc., which had been provided were not upto the prescribed standard. A tripartite committee was constituted including the National Mineral Development Corpn. Ltd., Federation of Mineral Industries, representatives from employer's side and Indian Mine Workers' Federation and Indian National Mine Workers' side apart from Steel Authority of India and Indian Bureau of Mines and this Committee made an in-depth study of the contract labour system in Limestone and Dolomite mines and submitted its report recommending prohibition of employment of contract labour in the Limestone and Dolomite mines. This report was placed before the Central Board and after consultation with the Central Board and following the process of law and keeping in view the guidelines in clauses (a) to (d) of

subsection (2) of Section 10 of the Act, the notification dated 17th March 1993 was issued by the Central Government. In this background, the requirement of consultation with the Central Board was fully complied with and there is no basis or material to hold that the impugned notification has been issued without application of mind.

RE: POINT 'B'

11. So far as the question of following the principles of natural justice and giving opportunity of hearing and the showcause notice is concerned, the point is stated only to be rejected for the simple reason that it is essentially a quasi legislative function and neither the opportunity or the show cause notice has been provided under the statute nor it can be said to be a case of notification entailing any penal consequence so as to attract the requirement of following the principles of natural justice. Neither it is the requirement of the statute nor it is required otherwise under law to follow the principles of natural justice in cases where the notifications are issued in exercise of quasi legislative function and if at all the requirement of following the principles of natural justice is stretched too far, the following of the same stands duly incorporated through the constitution of a tripartite Committee which includes the representation of the management as well as the employees. In the facts and circumstances of this case, the representation of the management was there in the Committee so as to place their point of view and in this view of the matter, the argument with regard to the natural justice or the grievance that the show cause notice was not issued and the opportunity was not given cannot be even said to be available to the appellants. Besides this, this point stands concluded by the decision of the Division Bench of our own High Court in the case of South Gujarat Textile Processors Association v. State of Gujarat, reported in 1994 (1) GLH 94 wherein, the notification issued under Section 10 of the same Act was under challenge and after considering the entire case law, the Division Bench categorically held as under:

> "Thus the decision of the Government reflected in the notification is clearly the result of quasi legislative activity and as such, it does not attract any requirement of provisions of notice for hearing."

This decision in the case of South Gujarat Textile Processors Association (supra) was followed and relied

upon in yet another Division Bench decision of our own High Court in the case of Alembic Chemical Works Co. Ltd. v. State of Gujarat, reported in 1995 (1) GLR 143 wherein the same principle has been reiterated with regard to the notification issued under Section 10(1) of the Act and the Division Bench has again held that, the law does not require that the notification should communicate the reasons why the Government exercises its power under Section 10 and that action taken by the Government is quasi legislative in nature and not quasi judicial or administrative. Therefore, while discharging quasi legislative function, the Government is not required to afford an opportunity of being heard to the petitioner.

RE: POINT 'C'

12. The thrust of this point is as to whether the contract labour may be prohibited only establishmentwise under Section 10 and not with reference to the works in the establishments in general. No provision of enactment or any part of a particular provision can be read in isolation. It is very clear that the object of the Act was to see that the employment of contract labour is to be regulated and abolished in appropriate cases. It is very clear that the Central Board under Section 3 is to advise the Central Government to carry out the functions assigned to it under the Act and the Central Board has also been invested with the power to constitute Committees. The employment of contract labour may be prohibited under Section 10(1) itself in any process, operation, or the other work in any establishment. There may be several establishments which may carry on the same process or operation or related works and, therefore, whatever any such process or operation or other works are carried out in establishments, the employment of contract labour may be prohibited. In the instant case, the notification itself says that the employment of contract labour is prohibited in the works and in the specified schedule in the Limestone and Dolomite mines. Therefore, in all these industrial establishments relating to Limestone and Dolomite mines, the contract labour has been prohibited with regard to the works specified in the schedule and therefore, there is no basis to say that the notification is not in accordance with Section 10 of the Act and that it can be done with reference to establishment only, as it has been clearly conceived that the prohibition of employment of contract labour may be for any process or operation or other works in any establishment and this has been precisely done through the notification in the instant case. The entry no.2

which has been substituted by the notification dated 4th July 1996 also does not impinge upon the validity of the notification and the consequence thereof. Even if the words, 'transportation of Limestone and Dolomite' has been deleted from the initial entry no.2 and it has been substituted so as to keep it confined within the mines site and not from the mines site to factory it would only mean that the prohibition of employment of contract labour is against the transportation within the mines site. While in the initial entry, loading into and unloading from was made to be inclusive of transportation of Limestone and Dolomite as such and under the substituted entry, the transportation of Limestone and Dolomite from the site to factory has been excluded, there is no basis to raise the argument that the notification becomes violative of Section 10 nor this substituted entry affords any ground so as to render the consequential order Annexure.B to be illegal at the time when it was issued in January 1994. We, therefore, do not find any substance in this point and the same is hereby rejected.

RE: POINT 'D'

13. The argument is based on Article 14 assailing the notification to be discriminatory. It appears that the basis of this argument is that as per the list of Limestone and Dolomite mines in India, there are thousands of Limestone and Dolomite mines located in various States which produce different grades of Limestone and Dolomite and different grades of Limestone/Dolomite are suitable for use in different industries which consume Limestone/Dolomite mines maintained captive mines and buy their requirement of Limestone and Dolomite from other lessees of such mines and that all Limestone and Dolomite mines are not mechanised. Mechanised mines employ skilled labour and non-mechanised mines employ unskilled labour and that there are regions where Limestone and Dolomite mines are situated in continuous large tracts and there are regions where Limestone/Dolomite mines are scattered. The production of different grades of Limestone/Dolomite so as to use in various industries for different purposes has nothing to do with the question of prohibition of employment of contract labour. The Committee which was constituted for that purpose and which submitted its report to the Central Board on the basis of which the notification under Section 10 has been issued by the Central Government had undertaken the task to consider

the working conditions of the labourers and the amenities provided to them at the working place and it found that even the minimum statutory amenities were not made available and that the contract labourers were suffering the exploitation in such Limestone and Dolomite industries with regard to the works for which the employment of contract labour has been prohibited and the same has been applied to all the Limestone and Dolomite mines with regard to the works specified in Schedule. The decision has been taken on the basis of an in-depth study of the working conditions of the contract labour on the basis of the recommendation made by the Committee and in consultation with the Central Board giving due regard to the guidelines of the stipulations under Section 10 of the Act itself. Once the Committee had collected the relevant information from the cross-sections of mines, captive and non-captive mines owners and management and the tripartite committee had considered the working of contract labour in Limestone and Dolomite mines in the Country as such, there is no question of discrimination and in our opinion merely because different grades of Limestone and Dolomite are produced and merely because the prohibition has been imposed in the Schedule of works in the Limestone and Dolomite mines in the Country in general, it cannot be said that it is violative of Article 14 of the Constitution of India or that it is discriminatory.

14. Once the notification under Section 10 is held to be invalid, the consequential orders cannot be challenged on the ground that before issuing the consequential order, an opportunity was not afforded. Once the employment of contract labour has been prohibited in the schedule of works in the impugned notification, the Licencing Officer under the Act and Assistant Labour Commissioner, Central, had to issue the orders revoking the licence and advising the concerned contractor not to carry on any contract labour in the prohibited categories as the impugned order dated 20th January 1994 itself shows that it was a direct result of the process of law and such consequence could not be avoided and in such a situation, the affording of any opportunity or giving the show cause notice could only be an exercise in futility which even otherwise was neither provided nor required. For the same reasons, the revocation of the certificate of registration of the Company was also justified and for that purpose also, there was no question of following the principles of natural justice.

So far as the impugned order dated 20th January 1994 is concerned, it is the direct consequence of the

impugned notification dated 17th March 1993 which has already been held to be valid and once the basic order has been held to be valid, the consequence has to follow. Even then, the learned Single Judge has already observed in para 51 of the judgment and has left it open to the appellants to file appeal against such orders before the appellate authority. Despite this, if the appellants believe that these orders are not appealable, it is their choice whether they avail the same or not. The opportunity has been kept open by the learned Single Judge to the appellants when the learned Single Judge observed that in case such an appeal is filed within a period of one month from the date of the judgment, the same shall not be dismissed on the ground of limitation and be decided on merits. In this view of the matter, we do not find it necessary to go into the question as to whether these orders were appealable under Section 15 of the Act or not because that opportunity has been left open by the learned Single Judge to the appellants. It is for the appellants to choose as to what course of action they seek to follow and as to whether they feel advised to avail the opportunity granted by the learned Single Judge or not.

RE: WHY THE LEARNED SINGLE JUDGE DECIDED THE SPECIAL CIVIL APPLICATIONS ON MERITS IN ABSENCE OF THE COUNSEL: HE SHOULD HAVE EITHER ADJOURNED OR DISMISSED IN DEFAULT.

15. Whereas all the grounds raised by the appellants challenging the decision of the learned Single Judge on merits have failed, we may deal with the question raised on behalf of the appellants that the Special Civil Applications under Article 226 and 227 of the Constitution could not and should not have been decided on merits by the learned Single Judge in absence of the party and/or its Counsel. While addressing the Court on this aspect of the matter, the learned Counsel for the appellants submitted that :

i) The Judges by themselves are not capable or equipped to decide the matter on merits without the assistance of Bar.

ii) The Court or Judges cannot investigate either facts or the law.

iii) The Court should not undertake the judicial adventurism to decide the matter on merits in absence of the Counsel.

iv) whether it would be appropriate for the

Court to resort to this method of deciding on merits?

v) That even if the party or its Counsel is not present, the Court should not decide the matter on merits and that it should either adjourn the matter or pass an order dismissing the case in default because principles of Code of Civil Procedure apply and even while exercising the powers under Article 226, the Court cannot depart from such well established principles and even if the Court has the power to decide the matter on merits, the power cannot be exercised arbitrarily by the High Court and the High Court cannot resort to the procedure which is arbitrary and it must follow the reasonable procedure.

16. While dealing with these questions and submissions as have been made by the learned Counsel for the appellants in the form and in the language as mentioned above, we may observe that our training as Lawyer and experience as Judge refrains us from commenting or expressing anything about the words in which certain submissions have been made as mentioned above because, it is for the concerned Counsel to choose his own words and his own vocabulary and it is the privilege of the learned Counsel to put his case as effectively as he can and in as strong words as he may find appropriate. Lord Dinning M.R. in his work, "Discipline of Law (1979, p.5) has written that, "Words are the Lawyers' tools of trade." In Rondel v. Worsely (1967)1 Q.B. 443 to 502, Lord Denning M.R. has observed as under:

"It is a mistake to suppose that the (Barrister) is the mouthpiece of his client to say what he wants: or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice."

It may be said that by any norms, the Law is a noble profession and those who practice law have to voice the highest principles of fairness in relation to everyone, while it is not unreasonable to expect the same of them also. Therefore, the learned Counsel for the appellants may be well within his rights to assail the judgment on the ground that ex parte dismissal of the petitions on

merits was bad, and that the learned Single Judge should have either adjourned the matter or should have dismissed the same in default and should not have decided on merits, but having carefully gone through the contents of para 7 of the judgment, we do not find that it was a case in which the learned Single Judge should have still adjourned the matters on the day when he proceeded to hear the same. The contents of para 7 of the judgment are reproduced as under:

"7. This Special Civil Application has been filed in the Court on 7th February 1994 and on 14th February, 1994, notice has been issued returnable on 18th February, 1994. After 18th February, 1994, I do not find anything on record of this Special Civil Application that the petitioners have pressed the same for early hearing of the matter for admission. After 14th February, 1994, the next order sheet is of date 4th February 1997 on which date, the matter has been adjourned to 21st February, 1997. On 21st February, 1997, the matter has been adjourned to 18th March, 1997 on which date, the Court has admitted the petition and it was directed to be heard finally in the month of June, 1997 with Special Civil Applications No.9401/93 and 1954/94. The matter has come up before this Court on 20th June, 1997 and on which date, the matter was called out for hearing in three rounds but none put appearance for the petitioners and it has been adjourned to 27th June, 1997. On 27th June, 1997 again though the matter was called out for hearing in three rounds but none put appearance for the petitioners and the matter has been adjourned to 7th July 1997 to give one more opportunity to the petitioners. On 8th July, 1997, the matter was taken up and in the first round when the matter has been called out for hearing Shri A.M.Kapadia counsel appeared for Shri S.B.Vakil and made a request for passing of the matter as Shri Vakil was reported to be busy in another Court. The matter was ordered to be passed over. In the second round when the matter was taken up none was present. In the third round again Shri Kapadia requested that Shri Vakil is busy in another Court and matter may be adjourned. This request has been accepted and the matter has been adjourned to 11th July, 1997. On 11th July, 1997, the counsel for the petitioners was present but the matter has been adjourned on the request of the counsel for the

> respondent for 12th August, 1997. On 12th August, 1997, the matter has been adjourned to 26th August, 1997. On 26th August, 1997, the matter has been adjourned to 19th September, 1997. On 19th September, 1997, the matter was called out for hearing in the first round and Shri Kapadia counsel who appeared for Shri Vakil prayed for passing over the matter as Shri Vakil was stated to be busy in another Court. Thereafter the matter has been called out in the second round and third round but none put appearance for the petitioners and the arguments of the counsel for the respondents were heard and after perusing the Special Civil Application the order was kept reserved. I stated all these facts to show how these matters are being taken up by the petitioners in this Court."

The learned Counsel for the appellants has even attempted to challenge before us the correctness of certain parts of the aforesaid contents and has submitted that they do not go with the Farads, but we do not find any reason or material on the basis of which the contents of para 7 can be disbelieved. When the matters are passed over or kept back on the same day in the first round or in the second round or in the third round, no record of such rounds is maintained in the Farads. The contents of para 7 as above go to show that the matter was adjourned for umpteen number of times and in various rounds on different dates. Thus, we do not find any justification in the arguments of the learned Counsel for the appellant that the matter should have been adjourned on the day the learned Single Judge proceeded to hear the matter.

17. Now comes the question as to whether the Special Civil Applications should not have been decided on merits and that they could have been at the most dismissed in default. In this regard, we may straightway make reference to the explanation below Section 141 of the Code of Civil Procedure, whereby the proceedings under Article 226 of the Constitution have been excluded and therefore, the provisions of the Code of Civil Procedure may not apply as such with that rigour. Yet, the learned Counsel for the appellants may be right in making the submission that the general principles would still apply. So far as the application of the general principles of the Code of Civil Procedure is concerned, it would not impinge upon the Courts' power while exercising jurisdiction under Article 226 of the Constitution of India to decide a matter on merits if the Court finds that despite all efforts and repeated opportunities,

there is persistent default on the part of the Counsel to appear before the Court as and when the matter is called out for hearing and, therefore, in appropriate cases if the Court proceeds to decide the matter on merits, it cannot be said to be wrong, unjust, arbitrary, unfair or illegal, in any manner. Therefore, while hearing a petition under Article 226 of the Constitution of India, it is open for the Court to proceed with the matter on merits in appropriate cases and there is no fetter with the High Court while exercising the power under Article 226 of the Constitution that it can only dismiss the matter in default and it cannot decide the same on merits, and in case it decides on merits, it is not open to challenge that the order is without authority or law and in the facts of the present case, it cannot be said that the learned Single Judge should not have proceeded with the matter on merits. What is open to criticism is the judgment before the higher Court and not the Judge. The learned Counsel for the appellants cited a case before us in the case of Shantilal Chandra Skehar and anr. v. Bai Basi, reported in 16 GLR 1. In this case, the Division of our High Court was dealing with an order passed in a Second Appeal whereby a learned Single Judge of this Court dismissed the appeal in absence of the learned Counsel by saying that,

> "Having gone through the judgments of the Courts below, and the memorandum of appeal, I see no reason to admit this appeal. Dismissed."

When this order was challenged before the Division Bench, the Division Bench held that, on the analysis of the provisions of Order 41 Rule 11 read in the light of the scheme of Order 41 Rule 1, Order 41 Rule 17, Order 41 Rule 19 and Order 41 Rule 30 an identical language to be found in Order 41 Rule 11(2) and Order 41 Rule 17(1), it is obvious that it is not open to an appellate Court to dismiss an appeal on merits at the admission stage, if when the matter is called on for hearing, the appellant or his Advocate is absent. The only order which the appellate Court can pass in such situation is to dismiss the matter for default and even if the appellate Court purports to dismiss the appeal on merits, it must be read as an order of dismissal of the appeal for default. The next decision which was cited before us is the case of J.M.Patel v. P.G.Patel, reported in 34 (1) GLR 830 wherein a learned Single Judge of this Court has held that in the absence of the appellant or his Advocate, the appellate Court cannot dismiss the appeal on merits, the appeal can only be dismissed for default. The reference was made to the provisions of Order 41 Rule 14 and it was

also held that Section 151 saves the inherent powers of the Court and does not confer jurisdiction or authority on Courts to draw something which the Courts are otherwise not entitled to do. The Single Bench in this case was dealing with a Civil Revision Application directed against an order passed by the Second Extra Assistant Judge, Nadiad, in Civil Misc. Appeal. Learned Counsel for the appellants next cited before us a decision of the Supreme Court in the case of Rafiq v. Munshilal reported in AIR 1981 SC 1400. The Supreme Court in this case was dealing with a Civil Appeal arising out of Special Leave Petition (Civil) because the High Court had disposed of the appeal preferred by the appellant in the absence of the learned Counsel for the appellant. The reference was made to the provisions to Order 41 Rule 17; Order 43 Rule 1; it was a case in which the appeal had been dismissed by the High Court in default. The Supreme Court held that it would be unjust to a litigating party if the matter is dismissed in default and is not heard on merits merely because his lawyer did not remain present and in this context while making certain observations with regard to the helplessness of the litigant beyond engaging a Counsel and reposing full faith in the Counsel, the Supreme Court directed that the appeal be restored to its original number in the High Court and be disposed of according to law. It is, therefore, clear that the Supreme Court felt that the matter must be considered on merits and it should not be dismissed in default. In this case, the observations made by the Supreme Court in para 3 thereof would make the position clear.

"3. The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the Court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court

> with regard to his appeal nor is he to act as a watch-dog of the advocate that the latter appears in the matter when it is listed. It is no part of his job. Mr.A.K.Sanghi stated that a practice has grown up in the High Court of Allahabad amongst the lawyers that they remain absent when they do not like a particular Bench. May be we do not know, he is better informed in this matter. Ignorance in this behalf is our bliss. Even if we do not put our seal of imprimatur on the alleged practice by dismissing this matter which may discourage such a tendency, would it not bring justice delivery system into disrepute. What is the fault of the party who having done everything in his power and expected of him would suffer because of the default of his advocate. If we reject this appeal, as Mr.A.K.Sanghi invited us to do, the only one who would suffer would not be the lawyer who did not appear but the party whose interest he represented. The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer obviously is in the negative. May be that the learned advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted. Therefore, we allow this appeal, set aside the order of the High Court both dismissing the appeal and refusing to recall that order. We direct that the appeal be restored to its original number in the High Court and be disposed of according to law. If there is a stay of dispossession it will continue till the disposal of the matter by the High Court. There remains the question as to who shall pay the costs of the respondent here. As we feel that the party is not responsible because he has done whatever was possible and was in his power to do, the costs amounting to Rs.200/should be recovered from the advocate who absented himself. The right to execute that order is reserved with the party represented by Mr.A.K.Sanghi."

This decision rendered by the Supreme Court has been followed in the case of Smt. Lachi Teewari and ors. v. Director of Land Records, reported in AIR 1984 SC 41

wherein the Supreme Court has observed that nothing more could be expected of a petitioner who had engaged three lawyers. This again was a case in which the Supreme Court was dealing with a Civil Appeal and it considered the provisions of Order 9 Rule 9 of the Code of Civil Procedure and found that Rule nisi which had been obtained 7 years previously was discharged for default of appearance and, therefore, the matter was restored to be disposed of by the High Court on merits. This again shows that the only care is to be taken that the matter is decided on merits. All these matters were considered in matters arising under the Code of Civil Procedure and not under Article 226/227 of the Constitution of India.

18. In the instant case, the learned Single Judge has decided the matter under Article 226/227 on merits and the matter has not been dismissed in default and we find that the learned Single Judge has not committed any error in taking up the matter on merits and deciding the same. This question also stands concluded by a Division Bench decision of our own High Court in the case of Dist.Rural Dev. Agency v. N.K.Patel decided on 21.8.1998 reported in 1998 (2) GLH 663, in which incidentally the present learned Counsel for the appellants himself had appeared.

We have already dealt with the contentions which were raised by the learned Counsel for the appellants on the merits of the case against the decision of the learned Single Judge and we do not find any reason to take a view different than the one which has been taken by the learned Single Judge while dismissing the Special Civil Applications and, therefore, the order passed by the learned Single Judge which is impugned in these appeals does not warrant any interference. There is no merit in these Letters Patent Appeals and all these 15 Letters Patent Appeals are accordingly dismissed. The notice issued by this Court in these matters is hereby discharged. No order as to costs.

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